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Supreme Court of the United States

OCTOBER TERM, 1934

No. [redacted]0 13

BECKER STEEL COMPANY OF AMERICA,
Petitioner,

against

HOMER S. CUMMINGS, Attorney General of the United States in his official capacity as Alien Property Custodian, and WILLIAM A. JULIAN, as Treasurer of the United States,
Respondents.

PETITION AND BRIEF FOR WRIT OF CERTIORARI.

E. CROSBY KINDLEBERGER,
Of Counsel for Petitioner.

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Supreme Court of the United States

OCTOBER TERM, 1934

BECKER STEEL COMPANY OF AMERICA,
Petitioner,

against

HOMER S. CUMMINGS, Attorney General of the United States in his official capacity as Alien Property Custodian, and WILLIAM A. JULIAN, as Treasurer of the United States,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Becker Steel Company of America, formerly a West Virginia corporation, doing business in the Southern District of New York, respectfully shows to this Honorable Court:

I. This is a petition for a writ of certiorari to construe Section 9(a) of the Trading with the Enemy Act (Act of October 6, 1917; chap. 106, 40 Stat. 411); and the relation of the Fifth Amendment of the Constitution of the United States to such statute when property of an American citizen was mistakenly seized and sold. Material parts of the statute are quoted in full in the brief.

II. The District Court for the Southern District of New York, on October 4, 1934, dismissed for want of jurisdiction the bill of complaint brought, under Section 9(a) of the Trading with the Enemy Act, by this complainant and petitioner for the payment to it of $3,887.84, representing a portion of the *net proceeds* of the sale of certain shares of the treasury stock of the complainant, a West Virginia corporation, which had been mistakenly seized by the then Alien Property Custodian, A. Mitchell Palmer, as being enemy-owned.

The bill of complaint alleged that after the net proceeds of the sale of the stock, $20,000.00, were paid to the Alien Property Custodian, this official, and/or the Treasurer of the United States, paid out to third persons without petitioners knowledge or consent $3,887.84 for attorneys' fees, printing of catalogues, accountants' fees, and other charges; and that so far, petitioner has been unable to procure the return of these expenditures, notwithstanding the prior decree of the District Court for the Southern District of New York, that the sale of the complainant's treasury stock was unlawful and void, because in fact not *enemy-owned*.

Circuit Judge Julian W. Mack, sitting in the District Court, dismissed the bill for want of jurisdiction solely upon his interpretation of the Trading with the Enemy Act, that an American citizen could only recover from the United States (represented by the Treasurer, and/or the Alien Property Custodian) the property or money *actually held* by one of these officials at the time of the bringing of suit; and not what they should have held, the interpretation of the statute claimed by the petitioner as the only one consistent with the provisions of the Fifth Amendment to the Constitution of the United States. Judge Mack

in effect added to the word "held" the additional words "at the time of making claim or suit".

Judge Mack, in his opinion, stated that the precise question did not appear to have ever been decided in any of the cases. Our study of the cases confirms this statement, except that complainant believes that the language of certain opinions support its interpretation of the statute.

The Circuit Court of Appeals, Second Circuit, affirmed the dismissal of the suit for want of jurisdiction on the opinion of Judge Mack; and the matter has so far been finally determined against the complainant.

III. This suit raises an entirely different question from that presented to this Court on the applications for writ of certiorari in a previous suit by this complainant (290 U. S. 667), which involved the construction of Section 780 of the Judicial Code of the United States (28 U. S. C. A., Section 780), where there had been a change of government officials during the pendency of the former suit.

By reason of the decision of this Court in *Fix* v. *Philadelphia Barge Co.*, 290 U. S. 530, that where an action against government officials has abated, this referred only to the particular suit or action before the court and not necessarily to the cause of action, this present suit is brought.

IV. The important and novel question of law presented upon this application is whether the right given to bring suit in equity to recover property "held" in Section 9-a of the Trading with the Enemy Act should be construed literally to refer only to property or its proceeds actually or physically in the possession of the Alien Property Custo-

dian or the Treasurer of the United States when suit is brought under this statute, or should be construed liberally to refer to property which, in right and justice, one or more of these officials should hold, at that time.

Petitioner urges that in order to prevent the confiscation of property of an American citizen or corporation, Section 9-a of the Trading with the Enemy Act must be construed to give full and complete relief equal to that which applies in a case where an American citizen's property is taken by eminent domain.

The addition to the statute of the words "at the time of making of claim or the bringing of suit" after the word "held," and the harsh interpretation of the statute made by the courts below would make the statute unconstitutional as in violation of the Fifth Amendment, while the broad and liberal interpretation of the statute urged by petitioner would avoid any doubts as to its constitutionality.

V. Petitioner further alleges that there is a conflict in opinion between the decision of the Circuit Court of Appeals, Second Circuit, in this case and that of the Circuit Court of Appeals, Ninth Circuit, in the case of

Vowinckel v. *Sutherland*, 24 Fed. (2d) 196.

There that Court held that the Custodian was not authorized to make deductions from the property of an American citizen not incurred in protecting or administering the trust.

At page 198 the Court said:

> "If the Custodian is authorized to make the deductions here complained of, the remedy of the injured party is not complete and adequate. An

> innocent party is deprived of the use of his property by the acts of the government until the termination of a suit to recover it, and to then deduct the expenses incurred by the Department of Justice in an unsuccessful defense against the claim would work a grave injustice, such as Congress never intended. Nor is this a just and reasonable construction of the statute".

It is respectfully urged that the question involved in this case is of great importance and should be decided in favor of petitioner, and that the construction by the lower courts of Section 9-a of the Trading with the Enemy Act is erroneous.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals, for the Second Circuit, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case entitled on its docket, *Becker Steel Company of America,* Complainant-Appellant, against *Homer S. Cummings,* Attorney General of the United States, in his official capacity as Alien Property Custodian, and William A. Julian, as Treasurer of the United States, Defendants-Respondents; and that the said judgment of the said Circuit Court of Appeals, denying all relief to the petitioner herein, may be reversed by this Honorable Court, and that a mandate issue directing the District Court of the United States to make a decree that the petitioner be paid the sum of $3,887.84, with interest or increment, from February 20, 1919 (the date of the unlawful sale of its property), and

that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

And your petitioner will ever pray.

BECKER STEEL COMPANY OF AMERICA

By E. CROSBY KINDLEBERGER,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

BECKER STEEL COMPANY OF AMERICA,
Petitioner,

against

HOMER S. CUMMINGS, Attorney General of the United States in his official capacity as Alien Property Custodian, and WILLIAM A. JULIAN, as Treasurer of the United States,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

The Holdings of the Lower Courts

The District Court, for the Southern District of New York, dismissed this case for want of jurisdiction (R. 19), on an opinion (R. 20-23), rendered by Hon. Julian W. Mack, United States Circuit Judge (not reported).

In the Circuit Court of Appeals, Second Circuit, the decree was affirmed (R. 30) on the opinion of the court below, and is also not reported.

II

Jurisdiction

1. The date of the decree to be reviewed is March 11, 1935 (R. 30).

2. The jurisdiction of this Honorable Court is invoked under the Judicial Code, Sec. 240, as amended by the Act of February 13, 1925, Chap. 229, Sec. 1; 43 Stat. 938; 28 USCA, Sec. 347 (a).

III

Statute Involved

In addition to the Fifth Amendment of the Constitution of the United States, this case involves the construction of Section 9-a of the Trading with the Enemy Act, which reads as follows:

> "Section 9. *Claims to property transferred to custodian; notice of claim; filing; return of property; suits to recover.* (a) Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian

a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided,* That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this

Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated."
(Act of Oct. 6, 1917, chap. 106, 40 Stat. 411.)

IV

The Facts

The facts of the case are not in dispute; the courts below having held that on the facts stated in the bill of complaint, the proper construction of Section 9-a of the Trading with the Enemy Act gave no jurisdiction to the court to render a decree for the complainant-petitioner. The courts below denied, for lack of jurisdiction without considering the merits, a decree which petitioner sought, requiring the Attorney General, as the Acting Alien Property Custodian, or the Treasurer of the United States, to pay and deliver to the petitioner the sum of $3,887.84, which it alleges had been collected from the wrongful sale of the petitioner's property and afterwards paid out to third persons for fees and charges not connected with the protection of the trust or its administration, and solely occasioned by the wrongful sale of stock of petitioner, an American corporation, which had been adjudicated not to have been *"enemy-owned"*.

The bill of complaint, after referring to the incorporation of the complainant under the laws of West Virginia (R. 3) and that the Attorney General was now acting as Alien Property Custodian under statutory authority (R. 4), and that respondent Julian was duly qualified as Treas-

urer of the United States (R. 4), set forth that the suit was brought under the laws of the United States of America, and particularly under the Trading with the Enemy Act, and the Acts of Congress amendatory and supplemental thereto (R. 5).

It was then alleged that from and after February 9, 1917, the only outstanding capital stock of the complainant was 2,200 shares owned by one Becker who had been an American citizen since 1907 and 300 shares by William Peters, now an American citizen, and that the other 5,000 shares which had been previously issued had been surrendered and turned in to plaintiff's treasury for cancellation, and were owned by the complainant (R. 5).

The Seventh paragraph of the bill alleged that about July 12, 1918, A. Mitchell Palmer, then acting as Alien Property Custodian, claimed that 5,000 shares of the stock of this complainant held in its treasury was in fact enemy-owned, compelled its re-issuance and transfer to himself as Alien Property Custodian (R. 5, 6).

It was next alleged that the United States District Court for the Southern District of West Virginia, by decree directed the return of 2,500 shares to the complainant, but that on February 20, 1919, the other 2,500 shares of complainant's stock were sold for $20,000—

> "which sum was received and turned over by him to the then Treasurer of the United States" (Par. Ninth, R. 6).

The complainant then alleged that the 2,500 shares of complainant's stock so sold for $20,000 belonged to and were the sole property of the complainant; and were unlawfully seized, converted and sold by said A. Mitchell Palmer; and were of the full value of $20,000; and that

the proceeds of said sale and interest thereon at all times belong to this complainant (Par. Tenth, R. 6 and 7).

In Paragraph Eleventh it was alleged that from the $20,000 proceeds of said sale of said stock unlawfully sold, the then Alien Property Custodian, without knowledge or consent of the complainant, paid out from the principal of the fund so received to third persons named in the bill of complaint eleven specified items, aggregating $3,887.84—

> "that all of said payments were for advertising and printing of a catalog of the unlawful sale of said stock; for legal services in connection with said unlawful sale, and for other expenses directly due to the making of said sale" (Par. Eleventh, R. 7).

The Twelfth Paragraph of the bill alleged that these unlawful payments by the Alien Property Custodian and the Treasurer of the United States were made from the principal amount received on the unlawful and improper sale of the stock, and not from the income or other property of the complainant; and that none of the payments made to third persons, were in connection with the preservation of the property or its care—

> "and none of them could properly have been incurred, if said 2500 shares of stock had not been improperly and illegally sold, as hereinbefore set forth" (Par. Twelfth, R. 7 and 8).

The making of the claim for $20,000, the proceeds of the unlawful sale of the complainant's stock under Section 9-a of the Trading with the Enemy Act was referred to (Par. Thirteenth); the bringing of suit under Section 9 and its trial in Par. Fourteenth (R. 8 and 9); the decree made by U. S. District Judge Augustus N. Hand, dated

August 21, 1925, adjudged the sale illegal, because the stock belonged to the complainant, a West Virginia corporation, and

> "was not subject to seizure and sale as the property of an enemy alien" (R. 9);

and directing that the $20,000 be returned.

Subsequent paragraphs of the bill refer to complainant's attempt to collect the $20,000 due it; the refusal of the Government officials to pay the entire amount; $16,112.16 being all the money claimed to have remained in the alleged trust (Par. Tenth, R. 10); the circumstances of the payment of the $16,112.16 and the claim by complainant that such circumstances constituted duress in law (Pars. Seventeenth, Eighteenth and Nineteenth). Then follow allegations of a subsequent claim by complainant for interest under the case of *Henkels* v. *Sutherland*, 271 U. S. 298 (Pars. Twentieth-Twenty-second, R. 12); the decision of this Court in *Escher* v. *Woods*, 281 U. S. 379 (Par. Twenty-third, R. 12 and 13); previous attempts to secure payment of the $3,887.84; and denial of relief on the ground that the suit had abated (Pars. Twenty-fourth to Twenty-ninth, R. 13-15); the resubmission of the claim to the Attorney General of the United States in February 1934, and the refusal to make payment (Pars. Thirtieth and Thirty-first, R. 15 and 16). Then follows this allegation:

> "Thirty-second: On information and belief, by reason of the foregoing facts, Homer S. Cummings, Attorney General of the United States, in his official capacity as Alien Property Custodian, and each and every officer holding said position as Alien

> Property Custodian from July 12, 1918, up to and including the present time, and the Treasurer of the United States in office on July 12, 1918, and each and every Treasurer of the United States since that date (including the Treasurer of the United States at the present time), must be deemed in justice and truth to have had on hand as the property belonging to the complainant the sum of $3,887.84 and interest thereon from July 12, 1918" (R. 16).

The defendants made a motion to dismiss on the ground of lack of jurisdiction (R. 17, 18), and this motion was granted by order dated October 4, 1934 (R. 19); the opinion of Judge Julian W. Mack (R. 20-23), stating that on the facts stated in the bill of complaint the court had no jurisdiction, because he construed Section 9-a of the Trading with the Enemy Act to allow the recovery only of moneys actually and physically held by the Alien Property Custodian or the Treasurer of the United States at the time of bringing suit. Judge Mack said:

> "It seems to me clear that Section 9a, properly interpreted, was intended to give the person whose property had been wrongfully seized and sold, a remedy against the Government only for such property or money as at the time of the commencement of the suit is actually in the possession of the Alien Property Custodian or the Treasurer of the United States, and; as decided in *Henkels* v. *Sutherland*, 271 U. S. 298 (1925), any income therefrom actually received by the Government. It is not designed to charge the Government with liability for torts whether by the Alien Property Custodian or otherwise, and whether intentional or through a misconstruction of the law by such official" (R. 22).

He further said:

> "The exact question does not appear to have been decided in any of the cases that have been cited" (R. 22).

The last sentence of the opinion was—

> "The bill will be dismissed for want of jurisdiction" (R. 23).

POINT I

Section 9-a of the Trading with the Enemy Act should be construed liberally to give full and complete relief to American citizens whose property was illegally seized by the Alien Property Custodian.

The Trading with the Enemy Act was a necessary war statute for the successful prosecution of the World War. It is discussed in:

> *Central Union Trust Company* v. *Garvan*, 254 U. S. 554;
> *Stoehr* v. *Wallace*, 255 U. S. 239;
> *Behn, Meyer & Co.* v. *Miller*, 266 U. S. 457;
> *Henkels* v. *Sutherland*, 271 U. S. 298;
> *Woodson* v. *Deutsche Gold*, 292 U. S. 449;
> *Escher* v. *Woods*, 281 U. S. 379.

In *Central Union Trust Co.* v. *Garvan* (254 U. S. 554, 569), Mr. Justice Holmes said the Act gave the Custodian the *preliminary custody* of the property or authorized the *direct seizure* of the property

> "to make sure that it is forthcoming if finally condemned and *does no more*" (p. 569).

He further stated that the suspected alien-owned property should be transferred to the Alien Property Custodian, in any event, and the reservation of Section 9-a was necessary, for he said:

> "The reservation implies that mistakes may be made" (p. 568).

In the case of *Stoehr* v. *Wallace* (255 U. S. 239) it was held the statute was constitutional, Section 9 being referred to. Mr. Justice Van Devanter said (p. 246):

> "Thus there is provision for the return of property mistakenly sequestered; and we have no hesitation in pronouncing it adequate, for it enables the claimant *as of right*, to obtain a full hearing on his claim in a court *having power to enforce it if found meritorious.*" (Italics ours.)

In *Henkels* v. *Sutherland* (271 U. S. 298), where this Court held that American citizens must be paid in lieu of interest, whatever income had been derived from seized property, Mr. Justice Sutherland said (p. 301):

> "Whether the government shall pay interest upon its obligations depends upon congressional assent; but it *cannot confiscate the actual increment of property belonging to a citizen, or the increment of the proceeds into which such property has been converted, any more than it can confiscate the property or its proceeds, without coming into conflict with the Constitution.*" (Italics ours.)

In the *Henkels* case this Court also held that while the United States might deal with enemy-owned property seized by the Custodian as it might see fit,

> "it has no such latitude in respect to the property of an American citizen" (271 U. S. 298, at p. 301).

The *Woodson* case (292 U. S. 449) held that in the case of the property of alien enemies there were *no constitutional restrictions* to the retaining of any reasonable amounts for overhead or other expenses.

In *Escher* v. *Woods* (281 U. S. 379) the broad principle was definitely established by Mr. Justice Holmes, although the actual point litigated was the right of the Government to make an arbitrary deduction of two per cent. of the property involved, on the ground that this fairly represented the cost of its administration and care. This Court held that the deduction was improper, and on the broad question, Mr. Justice Holmes said (p. 384):

> "But, and this is the main thing, all of these provisions naturally are interpreted to refer to property that the Custodian *is entitled to hold*. It would be extraordinary if the charges incident to a seizure that the law did not intend the Custodian to make and a possession that the law requires him to surrender, were to be imposed upon the owner *whose interests were sacrificed up to the moment of restitution*. It seems to be going far enough to require him to bear the loss that he has suffered, without compelling him to pay the Government for its outlay in doing him harm." See *Hobbs* v. *McLean*, 177 U. S. 567. (Italics ours.)

The courts have recognized that Section 9-a of the Trading with the Enemy Act must be liberally construed to do justice to American citizens.

Miller v. *Robertson*, 266 U. S. 243;
Von Schwerdtner v. *Piper*, 23 Fed. (2d) 862;
(D. C. Md.).

In *Miller* v. *Robertson*, *supra*, this Court construing this section, and the word "debt" said (p. 248):

> "The purpose of section 9 was to prevent or lessen losses and inconvenience liable to result to non-enemy persons. This provision is highly remedial and should be liberally construed to effect the purposes of Congress and to give remedy in all cases intended to be covered. *United States* v. *Anderson*, 9 Wall. 56, 65, 66; *United States* v. *Padelford*, 9 Wall. 531, 538. The just purpose of the section is not to be defeated by a narrow interpretation or by unnecessarily restricting the meaning of the word within technical limitations. *United States* v. *Freeman*, 3 How. 556, 565; *Danciger* v. *Cooley*, 248 U. S. 319, 326; *French* v. *Weeks*, 259 U. S. 326."

That Section 9 should be liberally construed to assist an American citizen, also appears from the fact that there have been many decisions that this section is the only remedy which can be had.

Upon the liberal interpretation contended for by petitioner, it is submitted that what was meant by the word "held" by the Treasurer of the United States or by the Alien Property Custodian in Section 9-a was not a mere physical holding, but what these officials should have held as alleged in the Thirty-second Paragraph of the Bill of Complaint.

This suit is one in equity, as required by the statute and equity considers done what should have been done.

Camp v. *Boyd*, 229 U. S. 330;
Independent Wireless Telegraph Co. v. *Radio Corporation*, 269 U. S. 459.

A fair and just interpretation of the statute was given by the Circuit Court of Appeals for the Ninth Circuit, in *Vowinckel* v. *Sutherland*, 24 Fed. (2d) 196, where the question before the Court was whether it was proper for the Alien Property Custodian to deduct from the principal of the fund improperly seized by him—

(1) The expenses of a Deputy Attorney General in going from Washington to San Francisco to argue the case against the complainant;

(2) Printing expenses of the Government on the appeal, and

(3) Other minor expenses.

The court considered Sections 9 and 24 of the Act, and held that the remedy of the person whose property was seized was to be full, complete and adequate; and the court held that the particular expenses were not proper, as they were not incurred in protecting or administering the trust. The court said (at p. 198):

"If the Custodian is authorized to make the deductions here complained of, the remedy of the injured party is not complete and adequate. An innocent party is deprived of the use of his property by the acts of the government until the termination of a suit to recover it, and to then deduct the expenses incurred by the Department of Justice in an unsuccessful defense against the claim would work a grave injustice, such as Congress never intended.

Nor is this a just and reasonable construction of the statute."

The Court held that the deductions made by the Custodian were not authorized by law.

It is submitted that the reasoning in the case of *Escher* v. *Woods*, 281 U. S. 379, strongly supports the position of the complainant as the real intent of Section 9-a of the Trading with the Enemy Act; also the case of *Henkels* v. *Sutherland*, 271 U. S. 298.

It was claimed in the Circuit Court of Appeals by the United States Attorney that in the *Escher* case there were certain expenses allowed to be deducted. It does not appear what these items were, except that they were apparently incurred in the collection of income, and possibly the same charges that an American citizen would be required to pay in protecting or administering a similar trust. So far as appears, no dispute was raised as to the propriety of these small deductions.

In the *Henkels* case (298 Fed. 947, 948) the parties agreed as to what principal was due and there was no dispute as to certain deductions that had been made.

In this case it is important to remember that *all the net proceeds* of the property that was sold, first came to the Alien Property Custodian and was then paid out by him to the third parties, as stated in Paragraph Eleventh of the Bill of Complaint; and that none of the payments could properly have been incurred if the stock of this American corporation had not been improperly seized (Complaint, Par. Twelfth, R. 8).

The bald claim of the Government, so far sustained by the courts (R. 22) is that Section 9-a of the statute must be interpreted harshly and as if the "holding" applied to

the time of bringing suit or claim by the American citizen —*language not used in the statute*—so that the American citizen has no redress if his money has been spent, irrespective of the cause of the expenditure, the motives of the officials or the reason for the expenditure. It would authorize the confiscation of his money or property by officials acting for the United States in the following cases:

(a) When money paid to a representative of the Alien property office was stolen from him before it reached the Custodian.

(b) Where the representative was dishonest and stole the money himself, or lost it by speculating.

(c) Where the money was paid out for political advantage and to political favorites.

(d) Where, through neglect or favoritism, padded bills for alleged expenses were approved and filed.

(e) Where wholly unauthorized payments were made.

(f) Where the money or property was converted by the Alien Property Custodian, directly by him or his agents, or through ostensible payments, to third persons.

Many other examples could be offered.

It is respectfully urged that neither the history of the Act, as interpreted by the courts, nor its language permit of any such interpretation, and that if such would be the meaning of the Act, it would be clearly unconstiutional, as taking the property of an American citizen *without just compensation* in violation of the Fifth Amendment.

In the present case the petitioner (an American corporation) has so far been denied relief to recover merely

one-fourth of the proceeds of the sale of its property; on the theory that Section 9-a of the Trading with the Enemy Act only allows the recovery of moneys actually held by the government official at the time suit is brought, and that because the money was spent before 1922, when petitioner first brought suit (R. 8) petitioner has lost all remedy.

Section 9-a surely was not intended to mean that there must be a *time race* between the Alien Property Custodian and the American citizen; and that if the citizen did not bring suit *before the Custodian spent his money,* he could never get it back. This would put a premium on hasty and reckless assumption of authority by Government officials in matters of doubtful jurisdiction. It could also be a precedent for hasty Governmental usurpation and seizure of private property and property rights in other matters, under other statutes, where the right to act to the citizen's detriment was doubtful.

POINT II

Section 9-a of the Trading with the Enemy Act must be construed so as to make it constitutional, and not in violation of the Fifth Amendment.

It is well settled that statutes—especially acts of Congress—must be construed wherever possible to prevent their being held unconstitutional. This is also true when a grave constitutional doubt would arise if a claimed interpretation of an Act of Congress were made; while if the Act was interpreted otherwise, it would be admittedly constitutional.

Interstate Commerce Commission v. *Oregon, Wsahington R. & Nav. Co.*, 288 U. S. 14, 40;
United States v. *Shreveport Grain & Elevator Co.*, 287 U. S. 77, 82;
United States v. *Standard Brewery, Inc.*, 251 U. S. 210, 220;
Russian Volunteer Fleet v. *U. S.*, 282 U. S. 481, 492;
United States v. *La Franca*, 282 U. S. 568, 574;
Blodgett v. *Holden*, 275 U. S. 142, 148;
Phelps v. *United States*, 274 U. S. 341, 344;
Richmond Screw & Anchor Co. v. *U. S.*, 275 U. S. 331, 346.

In *Russian Volunteer Fleet* v *United States*, 282 U. S. 481, this court said:

> "The Act of June 15, 1917, if read according to its terms, presents no difficulty. A condition should not be implied which, to say the least, would raise a grave question as to the constitutional validity of the act. *Federal Trade Commission* v. *American Tobacco Co.*, 264 U. S. 298, 307; *Missouri Pacific Railroad Co.* v. *Boone*, 270 U. S. 466, 471; *Blodgett* v. *Holden*, 275 U. S. 142, 148; *Richmond Screw Anchor Co.* v. *United States*, 275 U. S. 331, 346; *Lucas* v. *Alexander*, 279 U. S. 573, 577."

If the statute is construed to give full relief where the American's property is improperly seized by giving him the full and fair value of his property, thus applying the law in cases of eminent domain by the United States or its officers under the Fifth Amendment, there would be no question of its constitutionality.

Cases involving the Fifth Amendment to the Constitution, and the necessity for full relief when a citizen's property is taken by the United States under Act of Congress or otherwise, have been referred to in a number of recent cases.

Olson v. *United States*, 292 U. S. 246;
Jacobs v. *United States*, 290 U. S. 13;
Perry v. *United States*, 55 S. Ct. 432;
Russian Volunteer Fleet v. *United States*, 282 U. S. 491;
Phelps v. *United States*, 274 U. S. 341, 344.

This Court in *Olson* v. *United States*, 292 U. S. 246, defined what compensation must be paid to a citizen of the United States, whose property was taken by the United States or federal officer.

Mr. Justice Butler there said (p. 255):

> "He is entitled to be put in as good a position pecuniarily as if his property had not been taken He must be made whole, but is not entitled to more. It is the property and not the cost of it that is safeguarded by state and Federal Constitutions."

In *Lynch* v. *United States*, 292 U. S. 571, which dealt with the question of war risk insurance policies, Mr. Justice Brandeis stated:

> "The Fifth Amendment commands that property be not taken without making just compensation."

In *Jacobs* v. *United States*, 290 U. S. 13, the United States Government erected a dam in Alabama, under the authority of an Act of Congress, and this dam was alleged to have increased the flow of water on a complainant's land.

The amount of the damages were not seriously disputed, but the question arose as to the item of interest and the Circuit Court of Appeals held that the complainant was entitled to damages on the theory of implied contract only, and hence no interest could be allowed.

Mr. Chief Justice Hughes said (p. 16):

> "This ruling cannot be sustained. The suits were based on the right to recover just compensation for property taken by the United States for public use in the exercise of its power of eminent domain. That right was guaranteed by the Constitution. The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary. Such a promise was implied because of the duty to pay imposed by the amendment. The suits were thus founded upon the Constitution of the United States."

While the cases above cited refer to the taking of land, the Fifth Amendment equally applies to the taking of other property.

Russian Volunteer Fleet v. *United States*, 282 U. S. 481;
Phelps v. *United States*, 274 U. S. 341, 344.

In *Russian Volunteer Fleet* v. *United States*, 282 U. S. 481, the Government took certain Russian ships during the late war; and the Russian corporation brought suit in the Court of Claims for compensation. The case was dismissed for want of jurisdiction (68 Ct. of Cl., 32), but this

Court reversed, holding that alien friends were entitled to the benefit and protection of the Fifth Amendment of the Federal Constitution.

In *Phelps* v. *United States*, 274 U. S. 341, 344 plaintiff's had a pier in New York harbor, which was taken by the Government during the war for use for war purposes. This court held that adequate compensation had not been given by the Court of Claims (61 Ct. of Cl., p. 1044), and said (p. 344):

> "Plaintiffs' property was taken before its value was ascertained or paid. Judgment in 1926 for the value of the use of the property in 1918 and 1919, without more, is not sufficient to constitute just compensation. Section 177 does not prohibit the inclusion of the additional amount for which petitioner contends. It is not a claim for interest within the purpose or intention of that section. Acts of Congress are to be construed and applied in harmony with and not to thwart the purpose of the Constitution. The Government's obligation is to put the owners in as good position pecuniarily as if the use of their property had not been taken. They are entitled to have the full equivalent of the value of such use at the time of the taking paid contemporaneously with the taking. As such payment has not been made, petitioner is entitled to the additional amount claimed. *Seaboard Air Line Ry.* v. *United States, supra,* 304 (43 S. Ct. 354); *Brooks-Scanlon Corp* v. *United States,* 265 U. S. 106, 123; *Liggett & Myers Tobacco Co.* v. *United States,* 274 U .S. 215."

It seems obvious that it is not just compensation to an American citizen or corporation for the Alien Property Custodian to wrongfully seize his property—here the $20,-

000 received as the *net proceeds* of the sale, and then pay out without the American's consent, $3,887.84 for expenses that would have been wholly unnecessary, if the Alien Property Custodian has simply *held the stock without selling it* until some court could pass upon the question of the right to make the seizure and sale.

The complainant feels that Section 9a was intended to give *complete* and not *partial* compensation, and that to hold that, the Alien Property Custodian could in good or bad faith pay out a large part of an American's money to third persons; and then say that Section 9-a of the Trading with the Enemy Act only required him to return to the citizen what part of the American's property, great or small, *that he had left*, would not be giving the American just compensation, and would be the clearest violation of the Fifth Amendment.

A private bailee or trustee who wrongfully takes or keeps the property of another is not entitled to be paid the expenses for a wrongful taking or keeping.

6 *Corpus Juris*, 1131;
Hobbs v. *M'Lean*, 117 U. S. 567;
United States v. *Todd Engineering Dry Dock & R. Co.*, 53 Fed. (2d) 1025; D. C. E. D. La.;
Matter of Hyde, 149 Misc. 291.

In 6 *Corpus Juris*, 1131, it was said:

> "No bailee, however, is entitled to reimbursement for expenses incurred by reason of his own negligence, misconduct or misuse of the property bailed."

In *Hobbs* v. *M'Lean* (117 U. S. 567), cited in *Escher* v. *Woods*, where Hobbs was the assignee of a contractor who

brought an action in the Court of Claims against the United States for damages, this court said:

> "But where one brings adversary proceedings to take possession of trust property from those entitled to it, in order that he may distribute it to those who claim adversely, and fails in his purpose, it has never been held, in any case brought to our notice, that such person had any right to demand reimbursement of his expenses out of the trust fund, or contribution from those whose property he sought to misappropriate.
>
> "The circuit court was right in not compelling the plaintiffs to pay for services rendered and expenses incurred in a proceeding adversary to their interest, and carried on for the benefit of others."

In *United States* v. *Todd Engineering Dry Dock & R. Co.*, 53 Fed. (2d) 1025; D. C. E. D. La., the court held that the repair company whose negligence caused a fire damage to a vessel, could not recover compensation for service of the salvage barge which it engaged. It was held that it had the duty to minimize damages occasioned through its negligent acts.

In *Matter of Hyde*, 149 Misc. 291, Surrogate Delehanty held that the executor (accountant-executor) who sold goods that did not belong to the estate, was not entitled to compensation for the expenses of the sale; and he was also denied commissions and counsel fee.

Almost daily, neglectful trustees are being surcharged for the expenditure of moneys of their trusts, at the instance of the beneficiaries; and there is no reason to apply any different rule in this case.

At the District Court argument Judge Mack suggested a distinction between the *Vowickel* case and *Escher* v.

Woods, supra, where the government officials were held to have *improperly retained* money belonging to the citizen, and the present case where the money was *improperly paid out.* Judge Mack said where the Government had improperly retained the moneys it was a matter of bookkeeping to give the appropriate relief, but he thought that Section 9 of the Statute required a different rule where the Government officials had paid out the money and no longer possessed it, even though the payment was wrongful.

It is submitted that there is no basis for the distinction, for if the citizen loses his property *in either way* it is equally within the Fifth Amendment.

This suit while nominally against government officials, was a suit against the United States:

Banco Mexicano v. *Deutsche Bank,* 263 U. S. 591;
Synthetic Patents Co. v. *Sutherland,* 22 Fed. (2d) 491; c. d. 276 U. S. 630.

The Government may allege that the United States as a sovereign cannot be sued without its consent:

Turner v. *United States,* 248 U. S. 354;
Morrison v. *Work,* 266 U. S. 481;
Lynch v. *United States,* 292 U. S. 571;
Perry v. *United States,* 55 S. Ct. 432, 435, 436.

In *Lynch* v. *United States,* 292 U. S. 571, however, this Court held that a right to sue the United States once given by statute can not be taken away without clear and explicit statement by Congress to that effect. It was held in that case that no withdrawal of the right to sue had been made.

The section of the Trading with the Enemy Act in question, while often amended has not been amended in the respects considered in this case; and there is no more reason to assume that Congress now intends to deprive an American citizen of his property than it did at the time of the Trading with the Enemy Act in 1917, when this Court said that Section 9-a, allowing correction of mistakes, was the main reason why the Act was constitutional.

POINT III.

The statute gives relief, notwithstanding former officials of the Government violated the rights of the American citizen.

It may be argued, as it was in the courts below, that the present acting Alien Property Custodian, Mr. Cummings, and the present Treasurer, Mr. Julian, had nothing whatever to do with the alleged wrongful acts in selling and disposing of petitioner's property, and that, therefore, they cannot be sued under the proper interpretation of Section 9-a of the Trading with the Enemy Act.

Section 780 of the Judicial Code of the United States (28 U. S. C. A. Sec. 780) was held by this Court in *Fix* v. *Philadelphia Barge Co.*, 290 U. S. 530, to permit a cause of action against one official to be continued against the new official after the resignation or death of the first one.

It presupposes a continuity of liability for questioned action by governmental officials. In actions under the Trading with the Enemy Act, if the opposite rule were the case and the accident of death or resignation of one government official who had improperly dealt with the property of

an American citizen would prevent all redress in a suit against the new official, a great injustice would result.

It follows that under the *Fix* case, the suit against the present Custodian and the present Treasurer, has power to determine the propriety and legality of acts of former custodians and former treasurers; and it is no defense that the present respondents while in office performed no acts that injured the rights of the petitioner.

The Writ of Certiorari Should Be Granted

Respectfully submitted,

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